e-Competitions
Competition Laws Bulletin

Collecting societies

Collecting Societies and competition law: An overview of EU and national case law

Anticompetitive practices, Foreword, Collecting societies, Licensing agreement, Copyrights, Abuse of dominant position, Preliminary ruling (Art. 267 TFEU), Judicial review, Price discrimination, Excessive prices, Concerted practices, Internet, Audiovisual, Entertainment, Media

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

Annette Luise Schild , e-Competitions, N° 45816, www.concurrences.com

I. Introduction

This introduction is meant to give an overview of Member State case law relating to Collecting Societies and to examine to what extent this is in line with EU practice. This is relatively easy to do as long as we look at the application of competition rules to Collecting Societies in the “offline world”. Matters are more complicated when it comes to speculating what compliance with EU competition law will mean for Collecting Societies in an online context in the future. In fact, what the regime for collective management of copyrights in the EU will look like in future would require a crystal bowl.

Collecting Societies [1] are organizations normally set up by right holders to manage their rights. They aggregate one or more of the rights of one or more categories of right holders, notably for licensing purposes. They also provide services such as auditing and monitoring of the use of rights and collecting and distribution of royalties. Thus, they ensure, on the one hand, that all right holders whose copyrighted works are “used” in some form are appropriately remunerated for that use, irrespective of whether they are individuals or large sophisticated companies. On the other hand, collective management is meant to permit users to use works lawfully without having to undertake massive efforts to determine who the relevant right holders are and how they can be remunerated.

In practice, monitoring of what rights are used in what form, and thus the enforcement of licensing arrangements for “national” copyrights, was long considered to be best left to national organizations so that *de facto* Collecting Societies managing one or more types of rights used to constitute national monopolies. Thus, from the standpoint of a user who wanted to obtain the right to, say broadcast, a wide range of music within a certain territory, there was (virtually) no competition and no question what Collecting Society (or Societies) he would have to go to in order to clear the rights. For a long time, this fact in and by itself was not considered to be contrary to EU competition law because the system was felt to be necessary in order to achieve the above-mentioned goals.

Nevertheless, the monopolistic structure of Collecting Societies also meant constant scrutiny by competition authorities in the EU in order to ensure that the Societies did not abuse their positions of strength by reducing competition more than necessary. Over several decades, much of the European case law therefore relates to investigations of possible abuses of dominant position by Collecting Societies in their dealings with members and users. Since in some cases, these dealings were based on reciprocal agreements between Collecting Societies, these were also under scrutiny under Article 101 TFEU. Quite often clarifications were the result of requests for preliminary rulings by Member State courts. This early EU law is briefly summarized in Section II below. Section III looks at more recent decisions and judgments in Member States, many of which relate to allegations that Collecting Societies abuse their dominance in the way they price their services to users or limit the freedom of members to look for alternative ways of managing their rights. Overall Member States appear to be comfortable with the guidance provided by EU precedents since there have been very few requests for preliminary rulings in the recent past.

This relatively stable situation is changing as a result of the increasing importance of online uses of music. The most recent EU and Member State case law examining to what extent this change leads to a different assessment of certain practices under applicable competition rules is summarized in Section IV. Finally, Section V raises questions relating to a future framework for collective copyright management services that the EU Commission might set up in order to respond to the changed environment.

II. The BASICS: the â€œOLD CASE LAW in the EU

The “old” case law of the Commission and the Court of Justice of the European Union (“ECJ”)

has been analyzed on numerous occasions and the only reason to include a summary in this overview is to provide the background to the cases brought in the Member States over the last decade [2].

A. Relationships with Members

The basic questions that arose with respect to membership were: (i) how are revenues to be distributed among members (ii) how many categories of rights does the right holder have to assign to the Collecting Society, (iii) how are non-nationals to be treated? All of these (and some more) questions were dealt with by the Commission already in 1971 in the *GEMA I* case [3].

(i) First of all, the Commission stressed in the *GEMA I* case that Collecting Societies may not discriminate among members in regard to the distribution of revenues [4]. According to the Commission, *GEMA* [5] had abused its dominant position by paying supplementary fees, from revenue collected from the membership as a whole, only to a certain category of members.

(ii) Second, we learned from *GEMA I* that it can be an abuse if a Collecting Society requires its members to assign unduly broad categories of rights, for example if it asks them to exclusively assign all their current and future rights with respect to all categories of works worldwide [6]. This aspect of the decision was later confirmed by the ECJ in the *BRT v. SABAM* case [7].. The Court considered as relevant whether the requirements in the statutes exceed the limits absolutely necessary for effective protection [8]. In the *SABAM* case, the Court ruled that ‘a compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member’s withdrawal’ [9]. Many years later, the Commission had to decide this issue again in the *Daft Punk* case. The two *Daft Punk* members had wanted to manage their own rights for exploitation on the Internet, CD-ROM, DVD, *etc*. *SACEM* [10] refused membership, arguing that its requirement that all of the rights of an author must be assigned is

necessary in order to prevent authors from assigning only the less valuable rights [11]. The Commission did not accept this argument and considered the refusal of membership disproportionate and contrary to Article 102 TFEU (ex Article 82 TEC). In its assessment it took into account, on the one hand, that individual rights management has become easier in the digital age and, on the other, that, in spite of this fact, only few Collecting Societies still have similar requirements as *SACEM*, which demonstrates that they could not be a prerequisite for efficient rights management. The Commission did not exclude entirely that *SACEM* could retain its rule against individual management as long as it is clear that derogations can be granted after a case by case analysis. Following the *Daft Punk* decision, *SACEM* modified its statutes so as to permit members to apply for a partial withdrawal of the rights they had assigned.

(iii) Also already in *GEMA I*, the Commission clarified that Collecting Societies may not refuse nationals of other EU Member States as members or impose discriminatory terms on them. According to the Commission, such practices must automatically be regarded as an infringement of Article 102 TFEU (ex Article 82 TEC). At a later stage, in response to a request for a preliminary ruling by the Munich Court of Appeals, the ECJ confirmed, in the *Phil Collins* case [12], that domestic provisions containing reciprocity clauses cannot be relied upon to deny nationals of other EU Member States' rights conferred on national authors because "*Copyright and related rights fall within the scope of application of the Treaty, within the meaning of the first paragraph of Article 7* [now Art. 18 TFEU]*; the general principle of non-discrimination laid down by that article is, therefore, applicable to them*" [13].

B. Relationships with Users

With respect to this relationship also, the ECJ addressed a number of important issues – again principally in response to requests for preliminary rulings. The questions were principally (i) whether Collecting Societies can refuse to work with foreign users; (ii) whether Collecting Societies can refuse to grant licenses for only parts of their repertoire and (iii) how to establish whether a Collecting Society's pricing is excessive and (iv) what constitutes abusive discrimination in this context.

The principal precedent in this connection is the Court's judgment in the *Tournier* case, which responded to a request for a preliminary ruling from the Court of Appeals in Aix-en-Provence [14]. In this case, French discothèque owners had complained that the fees charged by *SACEM* were excessive. They argued that they mainly used the Anglo-American (dance) repertoire but nevertheless had to pay on the basis of the entire worldwide repertoire. When they tried to obtain a license directly from the relevant foreign Collecting Society this was refused. The Court's ruling in *Tournier* responds to most of the above questions:

(i) The Court made clear that a Collecting Society may refuse to grant direct access to its own national repertoire to users established in other EU Member States only if there is an objective reason such as that it would be too burdensome for the Collecting Society to organize its own management and monitoring system in the countries where the users are located. Even then, however, the Court emphasized that if the refusal were the result of agreements or concerted practices between Collecting Societies, this would fall under Article 101 TFEU (ex Article 81 TEC) [15]. Thus, one of the main arguments of the *CISAC* case, which is presently under review by the General Court (and described further below), was prepared already by *Tournier*.

(ii) The Court also had to examine whether Collecting Societies abuse their dominant position if they refuse to grant licenses for only parts of their repertoire [16]. The discothèque owners had asked *SACEM* to grant them licenses only for dance music within the Anglo-American repertoire but *SACEM* had refused this. Both the Commission and the French Government intervened and pointed out the practical difficulties of fragmenting the repertoire. *SACEM* argued that permitting access to anything other than the entire repertoire would add significantly to the administrative costs. On this

basis the Court ruled that the refusal to give access to part of a repertoire is not prohibited under Article 101 TFEU (ex Article 81 TEC), “ *unless access to a part of the protected repertoire could entirely safeguard the interests of the authors, composers and publishers of music without tereby increasing the costs of managing contracts and monitoring the use of protected works*” [17].

(iii) When it comes to assessing whether a Collecting Society's tariffs are excessive within the meaning of Article 102 TFEU (ex Article 82 TEC), the Court considered that this may be the case if the royalties charged are appreciably higher than those charged in other Member States — unless the differences is justified by objective and relevant factors [18].

More recently, in the *Kanal 5* case [19], the ECJ examined a remuneration model applied by *STIM* [20] for the television broadcast of protected musical works, under which the royalties were calculated as a percentage of the revenue of the broadcasting companies but taking account also of the amount of music broadcast. The Court ruled that such a remuneration model is compatible with Article 102 TFEU (ex Article 82 TEC), unless another method exists which enables a more precise identification of the use and audience of those works without leading to a disproportionate increase of management and supervision costs [21].

(iv) In *Kanal 5*, the ECJ also addressed the question whether it was a violation of Article 102 TFEU (ex. Art. 82 TEC) that the royalties due were calculated differently depending on whether the broadcasting company is commercial or public. *STIM* had charged a flat rate for the public state-owned television company but used the above-mentioned mostly revenue-based system for commercial broadcasters such as *Kanal 5* and *TV 4*. According to the ECJ treatment is discriminatory within the meaning of Article 102 TFEU if the Collecting Society applies dissimilar conditions to equivalent services and if it places one type of television company at a competitive disadvantage without objective justification. It held that the Market Court should assess first of all whether the public and private TV channels are competitors and pointed out, in particular, that it is important to*â€œtake account of the fact that, unlike Kanal 5 and TV 4, SVT [the public broadcaster] does not have either advertising revenue or revenue relating to subscription contracts and of the fact that the royalties paid by SVT are collected without taking account of the quantity of musical works protected by copyright actually broadcast*” [22].

C. Relationships with other Collecting Societies

The relationships between Collecting Societies in different countries that are responsible for the administration of the same type of rights have long been governed by reciprocal representation agreements. In these agreements the contracting Collecting Societies give one another the right to exploit the copyrights on their respective repertoire in their respective territories.

The lawfulness of these arrangements was assessed by the ECJ already in the above-mentioned *Tournier* and *Lucazeau* cases. At the time, the ECJ concluded that reciprocal representation agreements did not fall under Article 101(1) TFEU (ex Article 81(1) TEC), at least as long as there was no concerted action. The main reason was that in order to be able to enforce licensing of works used it was considered necessary to have the infrastructure to engage in physical monitoring of copyright usage [23]. Thus the ECJ emphasized that a system of reciprocal agreements ‘ *enables copyright-management Societies to rely, for the protection of their repertoires in another State, on the organization established by the copyright-management Society operating there, without being obliged to add to that organization their own network of contracts with users and their own local monitoring arrangements*’ [24].

III. Abuse cases brought against Collecting Societies in Member States

Over the last decades, Member State Authorities and national courts have regularly dealt with questions relating to Collecting Societies, and in particular with issues of abuses of a dominant position by a Collecting Society towards users. In their decisions, the investigating Authorities and Courts usually examined EU precedents. These seem to have been considered as sufficiently clear since there have been relatively few references for a preliminary ruling to the ECJ over the last years. This said, when Member States apply the "rules" established by the ECJ to the facts at hand, we also find many of the issues and difficulties familiar from EU case law. Thus wherever cases were brought on grounds of excessive pricing, authorities and courts struggled (and sometimes failed) to find a valid benchmark against which to measure the prices charged by the Collecting Society. While authorities seemed somewhat more at ease with cases based on discrimination, they did not always come to the same conclusions, such as *e.g.* when it came to deciding whether the services offered by public and private broadcasters or the conditions applied to other users were really comparable.

A. Excessive pricing

In general, excessive pricing abuses have not been an enforcement priority of the Commission with the result that there is very little EU precedent. This said, the limited case law there is, in particular *Tournier* [25] and *Lucazeau* [26], is regularly taken into account by Member State Authorities when it comes to assessing whether a Collecting Society applies excessive pricing. As mentioned above, in these cases the ECJ held that a national Collecting Society imposes unfair trading conditions when the royalties it charges are significantly higher than those charged in other Member States - unless the differences in pricing are based on objective and relevant dissimilarities in the copyright management in the Member States compared. Member States struggled with both elements of this test. On the one hand, it often proved difficult to establish whether a certain Collecting Society in another Member State was really sufficiently comparable in terms of copyright management and in some cases it is not immediately apparent from case reports how thorough a certain Authority or court investigated that question. On the other hand, reading Member State cases it becomes apparent that the facts in the *Tournier* and *Lucazeau* cases were somewhat unusual given that the at the time of investigation the relevant rates in France were many times higher than those applied in the UK or Germany and more than four times higher than the European average rates. Member States comparing rate levels rarely found comparable differences in rate levels and thus had difficulties in answering the question when a fee can be considered as "significantly higher".

An early Italian case [27] illustrates a rather straight-forward application of the *Tournier* and *Lucazeau* rulings. The facts in question were similar to the EU cases to the extent that the fees charged by *SIAE* [28] were considerably higher than in all other Member States (with the exception of France). The Italian competition authority assessed the level of the fees on the basis of a comparative study conducted by the European Commission the results of which had been published in 1991. It found that the rates charged by *SIAE* were excessive for two reasons: first because the amounts charged were considerably higher than in all other Member States, and, second there was no link between the actual performance of the music and the remuneration of the authors. While the investigation was ongoing, the Collecting Society revised the criteria for the distribution of the fees and the Authority considered that the more precise distribution of the fees justified the higher rates.

The Greek competition authority, which had to investigate the lawfulness of the prices charged by *AEPI* [29], approached the second question differently. Still following *Lucazeau,* the Authority considered that the price should not exceed the "competitive price" by a significant margin [30]. The tariffs applied by *AEPI* were then tested against the prices charged by the Swiss collective administration organization, which - for reasons not entirely clear from the case report — was considered a particularly appropriate benchmark. When it came to ascertaining whether the fees were "appreciably higher" within the meaning of the *Tournier* and *Lucazeau* cases, however, the Authority stated that any commission charged should be considered abusive to the degree that it exceeds 15% of the revenues from royalties. Establishing such precise levels certainly goes beyond what the EU Commission and the EU Courts have done in the past [31].

The Spanish experience also illustrates that the *Tournier* and *Lucazeau* test can be difficult to apply and that it offers a straight-forward solution only in extreme cases. In *Canal SatÃ©lite Digital - DTS/SGAE* , the Spanish Commercial Court, relying on *Tournier* and *Lucazeau,* held that *SGAE* [32] did not apply excessive pricing since the prices were not substantially higher than those charged by the Collecting Societies of Italy and France [33]. However, the Court did not seem to have conducted a thorough analysis whether the situation in France and Italy is sufficiently similar to permit using these countries as a benchmark and generally emphasized the weaknesses of using international comparisons- including with a reference to the Commission's *Port of Helsingborg*decision [34]. The fact that the Court did not motivate its choice of benchmark is indicative of the practical difficulties in finding reference rates. In another case [35], the Spanish Competition Tribunal dismissed claims that *AGEDI* [36] engaged in excessive pricing because the claims were not supported by sufficient evidence that the rates were substantially higher than the ones established in other EU Member States.

The Dutch competition authority (the NMa) on several occasions emphasized that in principle an analysis of excessive pricing should be cost oriented, rather than based on international comparison. Nevertheless it ended up applying the *Tourneau/Lucazeau* case law. In *Horeca Nederland v SENA* [37] the NMa rejected a complaint by an association of hotel, restaurant, and café businesses claiming that SENA had applied excessive rates [38]. On appeal, the Rotterdam District Court annulled the NMa's decision for lack of reasoning [39]. The NMa issued a new decision again rejecting the complaint [40]. The Authority first referred to a cost oriented test for excessive pricing, but added that this was not a suitable criterion in this industry as *SENA* did not incur significant costs related to the level of its rates. The NMa then followed the *Tournier* and *Lucazeau* rulings and compared *SENA*'s rates with those in Belgium Denmark, Germany and the UK for equivalent licenses and found that *SENA*'s rates were not higher. It therefore found that *SENA*'s rates were not excessive.

Two years later the NMa initiated a general market investigation into the tariffs set by royalty collection organizations on the basis of various complaints alleging that Collecting Societies charge excessive fees [41]. The conclusion of the investigation was that competition law does not offer a suitable framework for judging tariffs by Collecting Societies. The NMa again expressly acknowledges that in principle the analysis of excessive pricing should be cost oriented and that there is no truly satisfactory method to assess whether collective Societies charge excessive prices.

Shortly after issuing its report the NMa had to decide on yet another practical case. When Fresh FM, a local radio station, complained that *BUMA* [42] was charging excessive rates, the NMa reiterated the point it had made in its report that cost-geared pricing, international price comparisons and assessment of tariff differentiation are not appropriate methods for assessing whether a Collecting Society's fees are excessive [43]. The Authority nevertheless conducted a comparative analysis in different EU Member States. That comparison showed a mixed result with *BUMA* rates being sometimes higher, sometimes lower. On that basis the NMa concluded that *BUMA*'s rates were not " *several times higher as was the case in the SACEM judgment*" and therefore rejected the complaint.

B. Discriminatory pricing

In several of the above-described cases, allegations of excessive pricing were coupled with allegations of price discrimination. Thus, Member State Authorities and Courts examined Collecting Societies' pricing policies concerning different categories of users such as e.g., commercial and public broadcasters or national as opposed to regional radio stations. According to settled EU case law [44] different pricing for similar transactions leads to an abusive discrimination if the price differences cannot be objectively justified. National cases illustrate difficulties in assessing whether or not different users are comparable.

In one case, the Brussels Tribunal of First Instance had to assess the lawfulness of rebates granted by *SABAM* to a certain limited group of users. The Tribunal decided to refer the matter to the Brussels Court of Appeal, asking the Court

whether *SABAM*'s requirement that a user has acquired the status of "large organizer" (as defined by *SABAM*) in order to benefit from a 50 per cent rebate on royalties, constituted an abuse of a dominant position [45]. *SABAM* had argued that applying different tariffs depending on criteria such as the length and the intensity of its commercial relations with concert organizers in Belgium was an effective means to diminish or avoid the risk of non-payment of royalties but the Court did not consider this a valid argument. Furthermore, the Court found that *SABAM*'s tariff policy lacked transparency and clarity, and considered that this in and by itself was likely to favor differential treatment of *SABAM*'s contractual partners. Referring to the case law of the ECJ [46], the Court ruled that dominant undertakings are entitled to offer their customers discounts linked to the volume of trade, when justified on objective grounds such as economies of scale. However, the Court found that there were no economic justifications in support of the minimum royalties' threshold, that the difference between *SABAM*'s ordinary tariffs and those granted to "large organizers" was excessive and that its rebate policy led to the application of dissimilar conditions to equivalent transactions. The Court did not address the question whether users other than "large organizers" which were charged higher tariffs were placed at a competitive disadvantage and thus seems to have adopted the view that discriminatory pricing automatically leads to competitive disadvantages.

In several Spanish cases questions arose as to whether public and private TV operators are sufficiently similar so that unequal treatment can be considered as discrimination and it is interesting to compare the Spanish approach to the above-mentioned ECJ ruling in the case referred to it by the Swedish Market Court at roughly the same time. Thus, in 2006, the Spanish Competition Tribunal confirmed the findings of the Spanish Competition Commission (the CNC) that *AGEDI* had abused its dominant position by engaging in discriminatory pricing practices when it charged two private TV operators (six times) higher prices than the public Spanish TV [47]. According to the Tribunal, *AGEDI* had clearly applied unequal conditions to equivalent services. The Tribunal could not see any objective justification for the discrimination between private and public broadcasters and considered that the application of discriminatory prices generated competitive disadvantages to those charged higher prices. In 2008, the CNC fined *AGEDI* (again) and *AIE* [48] for discriminatory pricing [49]. The decision considered that the right to use the Collecting Societies' repertoires was a common input for TV operators regardless of whether the operator is public or private. Since public and private broadcasters compete for the acquisition of content, the CNC considered that the right to use the Collecting Societies' repertoire should be priced equally for all operators. Thus, the CNC does not seem to have been influenced by the ECJ's ruling in the *Kanal 5* case, which had left open the possibility that public and private broadcasters may not compete in the same market.

The position taken by the Dutch competition authority in assessing price discrimination regarding commercial and public broadcasters (though in this case related to radio stations) appears to differ from the approach adopted by the Spanish Competition Commission and the Spanish Competition Tribunal with respect to TV broadcasters in Spain [50]. The NMa had received a complaint from the commercial regional radio station *Fresh FM*,according to which *BUMA* created barriers to entry in the radio broadcasting market by discriminating in its pricing between public and commercial radio broadcasting companies, as well as between national and local radio broadcasting companies. *BUMA* argued that it is not in its interest to engage in exclusionary behavior against radio stations since it would benefit more from having more contracts with radio stations. Moreover, *BUMA* does not compete with any of the stations. The NMa agreed with *BUMA*'s reasoning. It noted that *BUMA* has a monopoly position on the market for collecting IP rights but is not active in the downstream market and therefore does not have any incentive to give some stations better conditions than others. Moreover, in assessing the different pricing regimes for public and commercial stations the NMa came to the conclusion that different tariff systems can be justified because public and commercial broadcasters are entirely different types of radio stations.

A recent Croatian case gives yet another perspective on the application of competition rules to price discrimination between different users - the problem with discrimination between TV operators using different means of broadcasting [51]. Following a complaint by several cable operators the Member State Authority investigated whether *HDS-ZAMP* [52] had abused its dominant position by discriminating between different providers of cable distribution services in collecting of

copyright fees for cable retransmission of music. All of *HDS-ZAMP*'s agreements applied the same formula for the calculation of fees - a basic fee multiplied by the number of TV channels and number of subscribers, calculated on a quarterly basis - but the Collecting Society offered discounts for a limited period of two years to some satellite operators in order to support the development of the market. The authority analyzed the cost structure of a cable TV operator and established that the royalties accounted for a negligible share of the costs. Therefore, it came to the conclusion that the discounts offered had no significant effect on competition and did not place other companies in a competitive disadvantage. It is worth noting that the Commission and the Community Courts have given little attention to establishing whether this condition is satisfied which suggests that they may consider that unjustified discriminatory pricing usually leads to competitive disadvantages.

C. Other abuses investigated

When it comes to the relationship between Collecting Societies and their members, national competition authorities largely followed the Commission's approach adopted in the *GEMA* and *Daft Punk* decisions trying to find the delicate balance between collective management and individual administration of rights.

Thus, the Greek Competition Authority considered that *AEPI* had abused its dominant position (under national law) by refusing to allow a creator to assign only parts of his rights to the Society [53]. The Authority looked at the ECJ case law [54] and European Commission decisions [55] and concluded leaving a greater freedom of choice to creators would not affect the effectiveness of the collective administration of IP rights (a fact that *AEPI* would have had to prove).

Similarly, the Polish Competition Authority found that *ZAiKS* [56] had abused its dominant position in the national music copyright management market by restricting authors' ability to assign to it only some categories of rights arising from their musical works [57]. The Society had made access to its collective management subject to acceptance by authors to tied licenses relating to public performance, mechanic reproduction and radio and television broadcasting. Interestingly, this decision also confirmed for the first time the application of Polish competition law to Collecting Societies, and thus bodies that are established by law in the country and not for profit. The decision that Collecting Societies are subject to competition law was confirmed by the Polish Supreme Court [58].

In a later case, the Polish Competition Authority also found the that *ZAiKS* had abused its dominant position by insisting on an excessive duration for its copyright management agreement [59]. *ZAiKS* had locked in the authors by requiring them to sign a provision that their copyright management agreement would terminate five years from signing, with no opportunity of terminating the agreement earlier. The Authority considered that the locking-in effect of the agreement restricted the opportunity of other competing Collecting Societies to enter into agreements with enough authors to make the collecting activity economically viable. Also, it limited the authors' freedom to change the manager of their copyright.

While *ZAiKS* seems to have adapted its agreement by permitting termination before the end of a five year period, one year later the Polish Competition Authority again found that the Society had abused its dominant position by imposing excessively long termination periods in copyright management agreements. Authors could terminate their copyright management agreements only after giving a six month notice effective of the end of a calendar year. As a result, an author might have to wait for actual termination of the agreement for as long as one and a half years, during which period it was not possible to change the copyright manager [60]. This was considered excessive by the Polish Competition Authority.

IV. The â€œnewâ€• RULES â€“ Collecting Societies in a changing world

With the increasing use of the internet there have been significant changes to the use of copyright-protected works. Works can be made accessible to anyone with an internet connection irrespective of where they are located. This has created a massive demand for multi-repertoire/multi-territory licenses because the alternative, negotiating with (one or more) Collecting Societies in each Member State before music can be offered lawfully via internet in the EU, would be a massive administrative headache and lead to significantly higher administrative costs [61]. At the same time, monitoring of use can to a large extent be done from a distance. Thus, a large part of the reasoning why it may be efficient to avoid competition between Collecting Societies, namely the need to avoid inefficient duplication of monitoring mechanisms, has gone.

A. Commission case law

While there were some attempts made by Collecting Societies to adapt reciprocal agreements in a way so as to make licensing easier, the Commission has had to revisit a number of questions the ECJ had already looked at - some of which also relate to offline uses. These relate, in particular to the lawfulness under Article 101 TFEU of reciprocal arrangements under which (i) Collecting Societies only deal with users in their own territories, and (ii) members have to use the Collecting Society in their country rather than choosing the most efficient one. Applied systematically, these clauses remove competition both for users and for members and cement the monopolistic structure of Collecting Societies with respect to their territories.

The first decision by the Commission concerning the collective management and licensing of certain neighboring rights for the purposes of commercial exploitation of musical works on the Internet related to the *Simulcasting Agreement*, which was notified to the Commission by *IFPI* [62]. Simulcasting, the simultaneous re-transmission of radio and television broadcasts via the Internet, requires broadcasters to obtain multi-territorial licenses because it automatically leads to the transmission of signals into several countries at the same time.

According to the original *IFPI* Simulcasting reciprocal agreement, each of the participating Societies could issue multi-territorial licenses for the online use of phonograms of the repertoires of these Societies only to online users established in their own territory. The EU did not consider this as justified because the task of monitoring use in the online environment can be carried out directly on the Internet (and thus from a distance), so that there really were no longer any efficiency reasons to limit competition. As a result the agreement had to be modified with the result that broadcasters whose signals originate in an EEA Member State were able to approach any EEA-based Collecting Society of their choice (other than in Spain and France) for the simulcast license [63]. This was to allow for competition between EEA Societies to grant multi-territorial licenses [64].

In addition, the Collecting Societies participating in the simulcasting agreement had to increase transparency with respect to the payment charged to the users, by separating the copyright royalty from the administration fee and by identifying them separately when charging a license fee to a user [65]. This transparency in pricing was meant to permit users to choose the most efficient Societies and to seek their licenses from the Society that provides them at the lower cost.

While the Commission initially was concerned about the fact that pursuant to the *IFPI* Simulcasting agreement the copyright-royalty element of the license tariffs (as opposed to the management fee element) were pre-determined and could not be changed by the Collecting Society granting a simulcasting license, it considered that without such a pre-determination the Collecting Societies might not be willing to contribute their repertoires. Therefore, the Commission considered this restriction as indispensable within the meaning of Article 101(3) TFEU (ex Article 81(3) TEC) and granted an individual exemption until the end of 2004. At that point in time the agreement expired.

At roughly the same time as the Simulcasting Agreement, the Commission also examined the *Santiago Agreement*, a reciprocal agreement concluded by nearly all the major European Collecting Societies representing authors (lyrics writers and music composers) in the area of music performing rights. The Santiago Agreement, was notified to the Commission in

April 2001 [66]. The agreement was to allow each of the participating Societies to issue multi-territorial licenses of public performance rights to be used on-line. The aim was to grant on-line commercial users «one-stop shop« copyright licenses including the repertoires of all participating Societies and valid in all their territories. However, users could obtain such a multi-territory/multi-repertoire license only from the Collecting Society established in their own Member State.

As in the *IFPI* Simulcasting case, while in principle favor of «one-stop shop« licenses in the online world, the Commission did not see a technical or other justification for territorial restrictions that prevent users from obtaining a license from the Collecting Society of their choice and Collecting Societies from competing for these users [67]. Another issue the Commission objected to was that the Agreement contained a Most Favoured Nation (MFN) clause which reinforced the territorial exclusivity.

BUMA and *SABAM*, the Collecting Societies who had first notified their agreements that were based on the Santiago Agreement decided not to defend the clauses in the Santiago Agreement. They offered undertakings amongst others, not to be party to any agreement on licensing of public performance rights for online use with other copyright management Societies containing an economic residency clause, similar to that contained in the Santiago Agreement. When the Santiago Agreement expired in 2004, it was not reviewed.

The most recent case decided by DG Competition is the *CISAC* case [68]. The Commission had opened an investigation following complaints from broadcasting group *RTL* and *Music Choice*, a UK online music provider. *RTL*'s complaint had been against *GEMA* concerning its refusal to grant a EU-wide license to *RTL* for its entire music broadcasting activities. *Music Choice Europe* had attacked the Collecting Societies' international umbrella association *CISAC* [69] claiming that certain clauses in a model contract proposed as a non-mandatory template for reciprocal representation agreements between *CISAC* members violate Article 101 TFEU. The Commission merged the two cases and, after a lengthy investigation and a failed attempt at finding a settlement, decided that two clauses in the model contract, in particular, violated Art. 101 TFEU. These were: (i) the membership clause, which prevents the *CISAC* members that are using the clause from accepting anyone as a member who has the nationality of one of the countries in which another *CISAC* member operates. This clause was applied by most *CISAC* members although *CISAC* removed them from its model contract already in 2004; (ii) the exclusivity clause, under which one Collecting Society authorizes another one to license and administer its repertoire on an exclusive basis within the territory of the latter. Collecting Societies using this clause were basically guaranteed a monopoly in their domestic market for the granting of licenses to commercial users. Jointly, the clauses prevented competition both for members and for users. The Commission also found that the systematic delineation of national territories through reciprocal representation agreements amounted to a concerted practice that is not objectively necessary.

The infringements relating to the membership and exclusivity clauses concern all forms of copyright exploitation including off line and online exploitation, and exploitation via satellite, cable and broadcasting but the infringement relating to the concerted practice on the territorial segmentation of the licenses only concerns internet, cable and satellite exploitation. The Commission decision specifically permits Collecting Societies to continue using reciprocal agreements and to keep their right to set levels of royalty payments due within their domestic territory. It emphasizes that removal of the membership and exclusivity clauses would allow authors to choose which Collecting Society manages their copyright and make it easier for users to obtain multi-territory multi-repertoire licenses for broadcasting music over the internet, by cable and by satellite from a single collection Society of their choice. The Commission also emphasizes that " *[t]he decision will allow Collecting Societies to compete on the quality of their services and on the level of their administrative costs (which are deducted from the money collected before it is passed on to the author). It will thus provide incentives to Collecting Societies to improve their efficiency*" [70].

The Commission decision is presently under appeal to the General Court by *CISAC* as well as 21 Collecting Societies but, as will be explained below, irrespective of the outcome of the appeals the behavior of many of the *CISAC* members has

long changed.

B. Case law in the Member States

Several Member State judgments suggests that, absent new reciprocal representation agreements, it may still be difficult for national Collecting Societies to grant cross-border licenses covering the repertoire of their sister Societies. Thus, just a week after the Commission decision in the *CISAC* case, *BUMA/STEMRA* announced that it would grant the US-based online electronic music retailer *Beatport* a pan-European license to the entire repertoire that *BUMA/STEMRA* had access to directly or through reciprocal representation agreements. According to the Society's press-release, the royalty rates applied through this multi-territorial license were the tariffs set in the country where the copyright was to be exploited [71]. Collecting Societies in other Member States were not amused and went to court. Thus *PRS* [72], which instituted proceedings against *BUMA* in the Netherlands, argued that pursuant to the reciprocal representation agreement, *BUMA* had obtained rights to the repertoire administered by *PRS* exclusively for the Netherlands and could therefore not grant licenses with a wider territorial scope. *BUMA* argued that the territorial restrictions contained in the reciprocal agreement did not apply to online music sales, because these have a multi-territorial reach. It also advanced that when signing the reciprocal agreements the parties could not even have thought about online uses so that it would not be reasonable to apply the territorial restrictions to them that were meant for other rights. *BUMA* also tried to rely on the *CISAC* case, and in particular its stance relating to territorial restrictions. However, the Court considered that the Commission had not meant to invalidate territorial restriction of licenses as such, but rather concerted practices between *CISAC* members in this respect and granted a preliminary injunction ordering *BUMA* to refrain from granting licensing agreements with effect outside the Netherlands. Thus, *BUMA* lost and this judgment was confirmed on appeal [73].

The same facts led to a 2008 judgment of the *Landgericht* Manheim in the *GEMA v BUMA* and *STEMRA* case [74]. The Regional Court of Mannheim also granted an injunction prohibiting the implementation of the multi-territorial licensing agreement proposed by *BUMA/STEMRA*. The Court found that the reciprocal representation agreement between *GEMA* and the Dutch Societies, which gave the latter the limited right to grant licenses for *GEMA*'s repertoire in the Netherlands was valid and prevented *BUMA* and *STEMRA* from granting a pan-European license covering *GEMA*'s repertoire. The Court also specifically examined the EU's decision in the *CISAC* case and concluded that this does not ban reciprocal representation agreements containing territorial limitations as such - it only attacks a coordination of the reciprocal representation agreements.

V. What will the future bring?

While DG Competition and Member State Authorities had to investigate individual cases of violations of competition rules by Collecting Societies, other Directorates General and the European Parliament have considered the larger picture of rights management in Europe. So far the Commission's instruments have been non-binding. Thus, in 2005 the Commission conducted an impact study on the cross-border collective administration of copyrights and neighboring rights for online music services. This study resulted in a report of July 7, 2005, which discussed three different options [75]. The report led to the Recommendation of 12 October 2005, which favored Option 3 of the impact study [76]. The famous Option 2 meant, according to the Recommendation, that *â€œ[r]ight-holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights*manager*or the right-holder.â€•* In addition, the Recommendation set out principles of good governance for Collecting Societies. On February 7, 2008, the Commission published a monitoring report in which it concluded that the Recommendation had been endorsed by a number of Collecting Societies, music publishers and user groups [77]. Finally, on April 23, 2010, the European Commission held a Public Hearing on the Governance of Collective Rights Management in the EU [78]. The European Parliament repeatedly expressed concerns with respect to the

Recommendation - both on procedural and substantive issues [79].

At the same time, over the last years, much has happened outside the "regular" system of collective management of rights by Collecting Societies. Thus, today there are a variety of sources for multi-territory licenses for at least some rights and parts of the world's music repertoire. This development is probably as much a response to market requirements and EU and Member State case law as it is a reaction to the guidance provided by the European Commission. Some of the examples include: multi-territory agreements such as those made directly between Google and YouTube on the one hand and different music publishers on the other to show music videos; the creation of *ARMONIA*, a joint venture between *SACEM*, *SGAE* and *SIAE*, which represents not only the repertoires of the three Societies in Europe but also the Anglo-American works of *Universal Music Publishing* and the Latin Works of *SONY/ATV*, as well as *Peer Music*; the launch of *Alliance Digital*, by the British Collecting Society alliance *MCPS-PRS* as a new platform that offers EU-wide licenses for the repertoire administered by small and medium sized publishers; the creation of *CELAS*, a joint venture between *GEMA* and *MCPS-PRS*, which was created specifically for the EU-wide administration of the repertoire of *EMI Music Publishing* in the online/mobile world [80]; *CELAS* signed the first EU-wide licensing arrangement with mobile operator *Omnifone* in January 2008, the announcement that *GEMA*, *MCPS-PRS* and *STIM* will be authorized to offer pan-European digital licenses for *Warner/Chappell*'s Anglo-American repertoire; the announcement that *GEMA* offers a "one-stop-shop" for pan-European licenses for online and mobile phone uses of the Anglo-American repertoire of *SONY/ATV*; the creation of *NCB*, a Nordic Collecting Society owned by the national Societies *KODA* (Denmark), *STEF* (Iceland), *STIM* (Sweden), *TEOSTO* (Finland) and *TONO* (Norway), which also has cooperation agreements with Baltic Collecting Societies *LATGA-A* (Lithuania), *AKKA/LAA* (Latvia) and *EAU* (Estonia). The offer, since early 2009, by the eight Nordic and Baltic collection Societies, with *NCB* acting as a facilitator, includes a Joint Nordic/Baltic Online License (JOL), which combines *NCB*'s mechanical rights with the local Societies' performance rights.

Given these and other examples, one might think that "the market" will regulate competition in the context of collective rights management. Such a view ignores, however, the fact that "unregulated" competition - for both members/repertoire and users - is unlikely to lead to results beneficial to all stakeholders. Thus, when the music publishers involved in the above mentioned or other deals withdrew their rights from the majority of European Collecting Societies, this must have had a major impact on the smaller Societies who were losing a significant part of their revenues. Unless they also manage to reduce administrative costs, that may mean less money for the right holders still represented by these Societies (and, as a result, potentially less creation). A "pure" competition lawyer still might look at this as a positive development, since it might lead to the disappearance of inefficient Societies and greater efficiency of the remaining ones who will do their best to convince right holders to join them. Then again, while it may well be true that several strong Collecting Societies competing for members may enhance efficiency, some will argue that the disappearance of the Societies in the smaller countries and the competition between large Societies for particularly lucrative repertoire will create significant hurdles for authors of works that are not (yet) very popular (and who may need the most protection). That, in turn, may lead to a reduction of cultural diversity. Finding a solution that increases the freedom of choice of right holders, facilitates multi-territory and multi-repertoire licensing for users and promotes greater administrative efficiency while protecting cultural diversity is a daunting task. The Commission, which is studying the issues, has been asked by many stakeholders to come up with a legislative solution - there is far less unanimity when it comes to defining what this should look like.

[1] Unless greater precision is necessary for the understanding of a case, in this article the term Collecting Society will be used to refer to all types of collective rights management organizations, irrespective of the precise rights or bundle of rights they manage.

[2] An excellent overview of EU case law and legislative developments is contained in Lucie Guibault and Stef van Gompel, *in* Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, second edition, Alphen aan den

Rijn: Kluwer Law International, 2010.

[3] G*esellschaft fur Musikalische Aufführungs und Mechanische Vervielfältigungsrechte (GEMA) v. Commission of the European Communities*, (1971) O.J. L. 134/15 [GEMA I]

[4] Gesellschaft fur Musikalische Auffhrungs und Mechanische Vervielf□igungsrechte (GEMA) v. Commission of the European Communities, (1971) O.J. L. 134/15 [GEMA I] page 23.

[5] GEMA is the German Society for musical performing and mechanical reproduction rights - Gesellschaft fur Musikalische Auffhrungs und Mechanische Vervielf□igungsrechte.

[6] Ibid., page 22.

[7] Court of Justice of the European Communities, 27 March 1974, Case C-127/73, Belgische Radio en Televisie (BRT) v. SABAM, (1974) E.C.R. 51 [BRT v. SABAM]. SABAM is the Belgian association of authors, composers and publishers. The acronym stands for Soci□ d Auteurs Belge - Belgische Auteurs Maatschappij

[8] BRT v. SABAM, at paras 8

[9] BRT v. SABAM, supra para. 12.

[10] SACEM is the French Society for authors, composers and music publishers - Soci□ des auteurs, compositeurs et □teurs de musique.

[11] European Commission, 12 August 2002, Case COMP/C2/37219, Banghalter/Homem Christo [Daft Punk] v. SACEM.

[12] Court of Justice of the European Communities, 20 October 1993, Case C-92/92, Phil Collins v. Imtrat Handelsgesellschaft GmbH, (1993) I E.C.R. 5145 (EMI Electrola GmbH v.Patricia Im- und Export was a joined case) [Phil Collins].

[13] Ibid, operative part.

[14] Court of Justice of the European Communities, 13 July 1989, Case C-395/87, Minist□ public v. Tournier , (1989) E.C.R. 2521 [Tournier].

[15] ECJ judgment in [Tournier], paras 16-26; ECJ judgment in Joint Cases 110/88, 241/88 and 242/88, Lucazeau v. SACEM, (1989) E.C.R. 2811 [Lucazeau], at paras 10

[16] See Tournier, at paras 27-33.

[17] Ibid., para 33.

[18] See Tournier, supra,paras 34-36. See also: Lucazeau, supra n. 26, at paras 21-33.

[19] Court of Justice of the European Communities, 11 December 2008, Case C-52/07, Kanal 5 Ltd and TV 4 AB v Freningen Svenska Tons□ares Internationella Musikbyr□STIM) upa , O.J. C. 32/2 of 7 Feb. 2009. See Tim Kasten, Sean Gerlich, *The ECJ Advocate General Trstenjak delivers opinion on remuneration model applied by a Swedish copyright collecting society (Kanal 5 and TV 4)*, 11 September 2008, e-Competitions, n 44676 .

[20] STIM is the Swedish collecting Society for songwriters, composers and music publishers - Svenska Tons□ares Internationella Musikbyr.

[21] See e.g., Anders Flood, *The Swedish Market Court makes a preliminary reference to the ECJ on copyright management by collecting societies (Kanal 5 and TV 4)*, 20 December 2006, e-Competitions, n 13624 .

[22] Kanal 5, para. 45.

[23] Tournier, supra n. X, at paras 34

[24] Tournier, supra n.X, at para. 19.

[25] Minist□ public v Tournier, C395/87 of .13.07.1989, [1989] ECR 2521.

[26] Lucazeau and others v Soci□ des Auteurs, Compositeurs et Editeurs de Musique; (SACEM), Joined cases 110/88, 241/88 and 242/88 of 13.07.1989, [1989] ECR 2811.

[27] SILB v. SIAE, 28 July 1995

[28] SIAE is the Italian Authors and Publishers Association

[29] AEPI is the Greek Society managing musical performing and mechanical reproduction rights - Hellenic Society for the Protection of Intellectual Property.

[30] See Ioannis Lianos, *The Greek competition authority considers that the Greek Society for the Protection of Intellectual Property has abused its dominant position on the market for the administration of the intellectual property rights of Greek and foreign composers (AEPI)*, 14 July 2003, e-Competitions, n 421 .

[31] Perhaps the closest the EU has come to this was in United Brands, where the European Court of Justice held that a price difference of 7% between United Brands
excessive pricing. See Court of Justice of the European Communities, 14 February 2008, Case C-27/76, United Brands v. Commission, [1978] ECR, page 207, paragraph 266.

[32] SGAE is the main Spanish collecting Society for songwriters, composers and music publishers, Sociedad General de Autores y Editores.

[33] See Aitor Montesa Lloreda, Angel Givaja Sanz, *A Spanish Court clears the main national collecting society pricing practice (Canal Satelite Digital - DTS / SGAE)*, 25 January 2006, e-Competitions, n 1148 .

[34] European Commission, 23 July 2004, Case COMP/A.36.570/D, Sundbusserne v Port of Helsingborg. See Antonio Carlos Teixeira, Michel Lamalle, Lenita Lindstrom-Rossi, *The European Commission rules on excessive pricing in the port sector (Scandlines Sverige v. Port of Helsingborg, Sundbusserne v. Port of Helsingborg)*, 23 July 2004, e-Competitions, n 36878.

[35] See Elvira Munoz Villar, *The Spanish Competition Court establishes that a collecting society has abused its dominant position by discriminating two TV operators but rejects plaintiffs* , 13 July 2006, e-Competitions, n 12397 .

[36] AGEDI is the Spanish Association of Management of Intellectual Rights and manages phonographic producers broadcasting rights - Asociaci□e gesti□e derechos intelectuales.

[37] SENA is the Dutch Society dealing with the management of neighboring rights - Stichting ter Exploitatie van Naburige Rechten.

[38] NMa decision of 27 August 2002, Available online at: http://www.nma.nl/documenten_en_pub....

[39] Rotterdam District Court judgment of 10 January 2005.

[40] NMa decision of 22 July 2005, Available at http://www.nma.nl/documenten_en_pub....

[41] NMa:

[42] BUMA/STEMRA are two Dutch entities that operate as one single company that acts as the Dutch Collecting Society for composers and music publishers.

[43] See An Renckens, *The Dutch competition authority clears a collective performance rights organisation of allegations of price discrimination and excessive pricing (Fresh FM - Buma)*, 2 April 2008, e-Competitions, n 19854 .

[44] See for example Court of First Instance of the European Communities, 12 June 1997, Case T-504/93, Tierc Ladbroke SA v Commission, [1997] ECR II-923.

[45] See Tarik Hennen, Alexandre Defossez, *The Brussels Court of Appeals ruled that the major Belgian collecting society has abused its dominant position under Art. 82 EU after having received an opinion from the EC Commission (SABAM/Productions & Marketing)*, 3 November 2005, e-Competitions n 524 .

[46] Court of Justice of the European Communities, 9 November 1983, Case 322/81, *Michelin v Commission*, [1983] ECR 3461, paragraph 71.

[47] See Elvira Munoz Villar, *The Spanish Competition Court establishes that a collecting society has abused its dominant position by discriminating two TV operators but rejects plaintiffs* , 13 July 2006, e-Competitions, n 12397 .

[48] AIE is the Spanish management Society of artists, interpreters or performers - Artistas Int□retes o Ejecutantes, Sociedad de Gesti□e Espaa.

[49] See Antia Tresandi Blanco, *The Spanish National Competition Commission fines collecting societies for the second time in two years for abuse of dominance in their management of intellectual property rights (AGEDI)*, 9 December 2008, e-Competitions, n 23801 .

[50] See An Renckens, *The Dutch competition authority clears a collective performance rights organisation of allegations of price discrimination and excessive pricing (Fresh FM - Buma)*, 2 April 2008, e-Competitions, n 19854 .

[51] Alexandr Svetlicinii, *The Croatian Competition Authority finds no abuse of dominance in the royalty collecting mechanism applied by the national collecting society for copyrighted music (Croatian Composers* , 16 December 2010, e-Competitions, n 34249 .

[52] HDS-ZAMP is the Croatian Composers

[53] See Ioannis Lianos, *The Greek competition authority considers that the Greek Society for the Protection of Intellectual Property has abused its dominant position on the market for the administration of the intellectual property rights of Greek and foreign composers (AEPI)*, 14 July 2003, e-Competitions, n 421 .

[54] Court of Justice of the European Communities, 27 March 1974, Case C-127/73, Belgische Radio en Televisie (BRT) v. SABAM and Court of Justice of the European Communities, 13 July 1989, Case C-395/87, Minist public v. Tournier .

[55] GEMA I, [1971] O.J. L 134/15; GEMA II, [1972] O.J. L 166/22 and European Commission, 12 August 2002, Case COMP/C2/37219, Banghalter/Homem Christo [Daft Punk] v. SACEM.

[56] ZAiKS is the Polish Association of Polish Authors and Composers.

[57] See Joanna Faruga, *Polish Competition authorities examine the dominant position abuse of an authors association on the national music copyright collective management market (ZAiKS)*, 9 January 2006, e-Competitions, n 1328.

[58] See Joanna Faruga, *The Polish Competition Authority imposes a financial penalty on an authors a late compliance with a previous cease and desist order (ZAiKS)*, 24 June 2008, e-Competitions, n 20636 .

[59] Decision of the President of the Office of Competition and Consumer Protection of 21 July 2009, No RWA -10/2009.

[60] Decision of the President of the Office of Competition and Consumer Protection of 24 August 2010. See Article from European Competition Network Brief, *The Polish Competition Authority issues first commitment decision on the basis of EU Law (ZAiKS)*, 24 August 2010, e-Competitions, n 33492 .

[61] This, among other reasons, was also why iTunes initially did not offer its services in all EU Member States.

[62] European Commission, 8 October 2002, Case No COMP/C2/38.014, IFPI .

[63] The agreement also included Societies from Central and Eastern Europe, Asia, South America, Australia and New Zealand.

[64] See IP/02/1436.

[65] IFPI Simulcasting decision, at para.103

[66] European Commission, 17 May 2001, Case COMP/C2/38.126, *Santiago Agreement*, see e.g. IP/04/586; the Santiago Agreement, which concerns public performance rights, was mirrored by the so-called Barcelona Agreement, which related to mechanical rights (European Commission, 4 June 2002, Case COMP/C-2/38.377, *BIEM Barcelona Agreements*).

[67] Ibid.

[68] European Commission, 16 July 2008, Case COMP/C2/38.698, *CISAC*; see Alain Andries, Bruno Julien-Malvy, *The European Commission prohibits European collecting societies from restricting competition as regards the conditions for the management and licensing of authors; public performance rights for musical works (CISAC)*, 16 July 2008, e-Competitions, n 35236 .

[69] CISAC is the International Confederation of Societies of Authors and Composers.

[70] See IP/08/1165.

[71] BUMA/STEMRA Press Release,
http://www.djzone.net/pg/news/wire/....

[72] PRS is the UK Performance Rights Society.

[73] See http://zoeken.rechtspraak.nl/detail....

[74] Regional Court of Mannheim (Landgericht Mannheim), 7 November 2008, Case n 7 O 224/08 Kart, *GEMA/BUMA, STEMRA*, see, Petra Linsmeier, Moritz Lichtenegger, *A German Court holds that reciprocal representation agreements concluded between national collecting societies are not void for breach of Art. 81 EC (GEMA/ BUMA, STEMRA)*, 7 November 2008, e-Competitions, n 26678 . Also James Killick, Katarzyna Czapracka, *Intellectual Property & Antitrust: A synthesis of EU and national case laws*, September 2011, e-Competitions, n38582 .

[75] These were Option 1: Do nothing (and thus leave things as they are with national Collecting Societies managing rights on a national basis with scope to go beyond this on the basis of reciprocal agreements with other national Collecting Societies); Option 2: Eliminate territorial restrictions and customer allocation provisions in existing reciprocal representation agreements (and thus make sure that each Collecting Society within the EU is able to grant EU-wide licenses); Option 3: Permit right holders to appoint a collective rights manager for the online use of musical works across the EU (so called EU-wide direct licensing).

[76] European Commission, 18 May 2005, Recommendation on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276/54 of October 21, 2005.

[77] See ec.europa.eu/internal_market/copyri....

[78] See http://ec.europa.eu/internal_market....

[79] European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)) and European Parliament resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services. The Parliament considers that it must be formally involved in a solution to be found, suggests that any solution must involve a directive and emphasizes the role of national Collecting Societies in guaranteeing cultural diversity and creativity.

[80] Interestingly, *CELAS*
reproduction rights in an online context that are independent from the online performance rights administered by GEMA failed in several instances. See LG Mnchen, Urteil v. 25.06.2009, Az. 7 O 4139/08, Link: http://tlmd.in/u/812 and OLG Mnchen, Az. 29 U 3698/09, http://www.urheberrecht.org/news/3936/.

Annette Luise Schild | Arnold & Porter (Brussels) | annette.schild@aporter.com